

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of USTelecom for Forbearance Pursuant)	WC Docket No. 18-141
to 47 U.S.C. § 160(c) to Accelerate Investment)	
in Broadband and Next-Generation Networks)	

**REPLY OF PUBLIC KNOWLEDGE, BENTON FOUNDATION, NEXT CENTURY
CITIES, NATIONAL HISPANIC MEDIA COALITION,
AND THE UTILITY REFORM NETWORK**

September 5, 2018

I. INTRODUCTION & SUMMARY.

Public Knowledge, Benton Foundation, Next Century Cities, National Hispanic Media Coalition, and The Utility Reform Network file this Reply in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice¹ seeking comment on the USTelecom—The Broadband Association (“USTelecom”) petition for nationwide forbearance (“Petition”)² from sections 251(c)(3)-(4), 271(c)(2)(B)(III), and 272(e)(1) of the Communications Act (“Act”).

The record overwhelming demonstrates that the USTelecom Petition has failed to meet the statutory prerequisites for obtaining forbearance. Section 10(a) of the Communications Act provides that forbearance is appropriate only where:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.³

¹ Pleading Cycle Established for Comments on USTelecom’s Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain 271 and 272 Requirements, WC Docket No. 18-141, *Public Notice*, DA 18-475 (rel. May 8, 2018); Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141, *Order*, DA 18-574 (rel. June 1, 2018).

² Petition for Forbearance of USTelecom—The Broadband Association, WC Docket No. 18-141 (filed May 4, 2018) (“USTelecom Petition”).

³ 47 U.S.C. § 160(a). “In making the determination under subsection (a)(3) [whether forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.” *Id.* § 160(b). In addition, “[a] State

The record is nearly unanimous in concluding that USTelecom has failed to make a *prima facie* showing that forbearance from enforcement of sections 251(c)(3)-(4), 271271(c)(2)(B)(iii), and 272(e)(1) of the Act or section 64.1903 of the FCC's Rules is warranted under the Commission's traditional forbearance analysis.⁴ USTelecom has failed to demonstrate that enforcement of these regulatory requirements is not necessary to ensure just and reasonable or nondiscriminatory charges and practices by ILECs or to protect consumers. Further, nothing in USTelecom's petition shows that the forbearance requested is consistent with the public interest.⁵ The USTelecom Petition must be denied.

II. USTELECOM HAS NOT MET ITS BURDEN FOR FORBEARANCE FROM THE UNBUNDLED ACCESS AND RESEALE PROVISIONS IN SECTIONS 251(C)(3)-(4).

The USTelecom Petition for forbearance from the unbundled network element ("UNE") access and resale provisions in section 251(c)(3)-(4), and associated requirements under sections 251 and 251, must be rejected because it does not satisfy its burden under the Commission's forbearance test. USTelecom has failed to provide any sufficient basis for the requested relief,

commission may not continue to apply or enforce any provision" from which the Commission has granted forbearance under section 10. 47 U.S.C. § 160(e).

⁴ 47 C.F.R. § 1.54(b).

⁵ 47 U.S.C. § 160(a). "In making the determination under subsection (a)(3) [whether forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.* § 160(b). In addition, "[a] State commission may not continue to apply or enforce any provision" from which the Commission has granted forbearance under section 10. 47 U.S.C. § 160(e).

particularly on a nationwide basis.⁶ The record also clearly demonstrates that USTelecom's Petition fails all three prongs of the Commission's forbearance test.

The record shows USTelecom has failed to show that enforcement of section 251(c)(3)-(4) is not "necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory," as required by the first prong of the Commission's forbearance test.⁷

The UNE and resale obligations under section 251(c)(3)-(4) constrain the ability of ILECs to lower output, increase prices, and reduce the frequency of innovative new service offerings than would be the case in a competitive market. As Granite Telecommunications ("Granite") explains, "[s]ection 251(c)(4) resale continues to be necessary to ensure reasonable prices and promote competition in the provision of services that rely on traditional TDM service."⁸ The Competitive Carrier Group notes, "[t]here is no question that resale rates will increase should the Commission forbear from Section 251(c)(4) avoided-cost resale obligations,"

⁶ See e.g., Comments of Liberty Cablevision of Puerto Rico, LLC, WC Docket No. 18-141, at 21-24 (filed Aug. 6, 2018), Comments of the Pennsylvania Public Utility Commission, WC Docket No. 18-141, at 3 (filed Aug. 6, 2018) ("Pennsylvania PUC Comments"), Comments of the Michigan Public Service Commission, WC Docket No. 18-141, at 2 (filed Aug. 6, 2018) ("Michigan PSC Comments"), Comments of the California Public Utilities Commission, WC Docket No. 18-141, at 2 (filed Aug. 6, 2018) ("California PUC Comments"), Opposition of First Communications, LLC, WC Docket No. 18-141, at 9-13 (filed Aug. 6, 2018) ("First Communications Comments"), Opposition of Access Point Inc., BullsEye Telecom, Inc., Matrix Telecom, LLC (d/b/a Impact Telecom), New Horizon Communications Corp., and XChange Telecom LLC, WC Docket No. 18-141, at 14 (filed Aug. 6, 2018) ("Wholesale Voice Line Coalition Opposition"), Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and The Northwest Telecommunications Association, WC Docket No. 18-141, at 7 (filed Aug. 6, 2018) ("Competitive Carriers Group Opposition").

⁷ 47 U.S.C. §160(a)(1).

⁸ Opposition of Granite Telecommunications, LLC, WC Docket No. 18-141, at 15-16 (filed Aug. 6, 2018) ("Granite Opposition"). See also *id.* at 16-35.

because state regulators would no longer be able to address inflated prices and “resale prices would no longer constrain the prices ILECs charge in commercial wholesale agreements.”⁹ The Pennsylvania State Public Utility Commission also expresses concern that if the Petition is granted,

the ILECs’ ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. The ability of ILECs to impose resale restrictions and conditions would allow ILECs to protect their market position by withdrawing services unilaterally and unconditionally. If the Petition is granted, ILECs could raise prices significantly if the resale obligation is eliminated.¹⁰

USTelecom provides no persuasive evidence to support its claim that “there is effectively no remaining UNE-based competition in that marketplace.”¹¹ Contrary to USTelecom’s claims, the record provides ample evidence to illustrate how competitive Local Exchange Carriers (“CLECs”) rely on reasonably priced access to UNEs and resale to compete. The Competitive Carriers Group notes that “UNEs play an essential role in ensuring that customers, particularly those in underserved communities without facilities-based competition, have access to advanced communications services at reasonable prices and terms.”¹² The Michigan Internet and Telecommunications Alliance details that “CLECs use UNEs to gain footholds in markets” they would otherwise be unable to enter, creating competitive choices for consumers.¹³ Indeed, the record makes clear that CLECs rely on UNEs as a bridge to serve customers while building out their own competitive network deployments,¹⁴ provide services that significantly differ from the

⁹ Competitive Carriers Group Opposition at 72.

¹⁰ Pennsylvania PUC Comments at 11-12.

¹¹ USTelecom Petition at 27.

¹² Competitive Carriers Group Opposition at 65. *See also id.* 65-69.

¹³ Comments of the Michigan Telecommunications and Internet Alliance, WC Docket No. 18-141, at 7 (filed Aug. 6, 2018) (“MITA Comments”).

¹⁴ *See e.g.*, Competitive Carriers Group Opposition at 42, *Ex Parte* Letter of U.S. Small Business, Administration Office of Advocacy, WC Docket No. 18-141, et al., at 3 (filed Aug. 1, 2018) (“SBA *Ex Parte*”), Opposition of the Electronic Frontier Foundation, WC Docket No. 18-

legacy voice and data services offered by an ILEC,¹⁵ “to provide backhaul or middle-mile transport from which to connect its microwave-based last-mile network infrastructure,”¹⁶ and provide the only viable competition to ILECs in many markets.¹⁷ It is clear that granting USTelecom’s Petition “would cause severe disruption in the telecommunications market,”¹⁸ and nothing in the USTelecom Petition demonstrates that enforcement of sections 251(c)(3) and 251(c)(4) is not necessary to ensure charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory across the entire United States. To the contrary, granting USTelecom’s request would likely result in UNE and resale rates that are unjust and unreasonable.¹⁹

USTelecom’s request for relief from sections 251(c)(3)-(4) also fails to satisfy the second prong of the section 10(b) forbearance test, and the record amply demonstrates that consumers will be harmed through having fewer competitors to choose from and paying higher prices for telecommunications services. USTelecom’s arguments are supported by no evidence whatsoever, and rely solely on the unproven assumption that deregulation, regardless of the context, will spur network deployment and competition. To the contrary, as the Competitive Carriers Group clearly explains, “[t]he plain impact of a grant of USTelecom’s Petition would be to either make UNE

141, at 2 (filed Aug. 6, 2018) (“EFF Opposition”), Comments of Blackfoot Communications, Inc., WC Docket No. 18-141, at 6-10 (filed Aug. 6, 2018) (“Blackfoot Comments”), Pennsylvania PUC Comments at 11.

¹⁵ See e.g., Blackfoot Comments at 3-5, Competitive Carriers Group Opposition at 14-18, Pennsylvania PUC Comments at 10.

¹⁶ Opposition of California Internet, L.P. (d/b/a GeoLinks), WC Docket No. 18-141, at 1 (filed Aug. 6, 2018) (“GeoLinks Opposition”).

¹⁷ See e.g., Wholesale Voice Line Coalition Opposition at 5, California PUC Comments at 5, Comments of Call One Inc., WC Docket No. 18-141, at 2 (filed Aug. 6, 2018) (“Call One Comments”), MITA Comments at 10-12, Competitive Carriers Group Opposition at 65-69.

¹⁸ MITA Comments at 3.

¹⁹ See e.g., *id.* at 10-12, Ohio PUC Comments at 5, Pennsylvania PUC Comments at 11-12, Granite Opposition at 15-35, Call One Comments at 2.

and resale-based wholesale services unavailable entirely or to raise their price. Either result harms consumers.”²⁰

Granting USTelecom’s request for relief from the Act’s UNE and resale obligations would likely cause the customers currently served by CLECs to “pay higher prices for the broadband services they currently use, settle for inferior service at the same rate, or lose service altogether.”²¹ CLECs would be forced to raise prices on customers when ILECs inevitably increase the price of essential inputs, and ILECs could either raise their prices or lure customers away from CLECs. “Once CLECs have left these markets because of their inability to offer competitive priced products, ILECs will have free rein to raise prices above competitive levels,” harming consumers.²²

Consumers in rural communities or those with specialized service needs are likely to be particularly hard hit. Consumers in remote and rural areas do not benefit from competition, and enforcement of sections 251(c)(3)-(4) are critical to ensure access to essential communications services. Without competition from CLECs, consumers would have fewer, if any, innovative service offerings to choose from and would pay higher prices.²³ As NTIA Administrator David Redl recently observed, incumbents operating in remote or less populated areas “do not face competitive pressures that the Commission sees in other parts of the country.... Oftentimes,

²⁰ Competitive Carriers Group Opposition at 7. *See also id.* at 55-57, 66.

²¹ Wholesale Voice Line Coalition Opposition at 23-24. *See also e.g.*, First Communications Opposition at 1, 13-15, Blackfoot Comments at 1.

²² *Id.* *See also e.g.* Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. (d/b/a TPx), WC Docket No. 18-141, at 27 (filed Aug. 6, 2018) (“TPx Opposition”),

²³ *See* Granite Opposition at 33-34.

carriers in these areas lack the incentives that exist in more populated areas....”²⁴ The Small Business Administration has also raised concerns that many CLECs had invested heavily in fiber using the revenue generated from UNEs and moving customers to their own facilities-based network over time. In addition, “[t]he presence of CLECs in the market appears to be providing competitive pressure for incumbents to likewise invest in new fiber deployment and network upgrades.”²⁵ Lack of access to UNES would hinder this progress. Further, business customers with specialized, or niche needs that make them more expensive to serve, such as banks, health care providers, and public safety users, and multi-location businesses are particularly at risk of losing access to service providers who can meet their needs, or paying significantly higher prices for connectivity.²⁶

USTelecom also fails the third prong of the forbearance test. Eliminating the ILEC’s UNE and resale obligations is clearly contrary to the public interest. As discussed *supra*, granting the Petition would likely hinder competitive network deployments, reduce the choices available to consumers, and lead to higher prices and less innovation.²⁷ In rural communities, granting the Petition risks rendering access to essential voice and internet services either non-existent or more unaffordable than it is today.²⁸

Additionally, the USTelecom-backed analysis assumes that the Commission’s forbearance is all that stands in the way of competitive service providers building out their own networks. However, if deregulation of ILEC monopoly power actually increased the incentive and ability of CLECs to enter the market, then the decade-long trend of deregulation of ILEC

²⁴ Letter from David J. Redl, Administrator, NTIA, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 2 (filed July 19, 2018).

²⁵ SBA *Ex Parte* at 3.

²⁶ See Competitive Carriers Group Opposition at 8, Granite Opposition at 32-33.

²⁷ See *e.g.*, MITA Comments at 13.

²⁸ See *e.g.*, GeoLinks Opposition at 2, First Communications Opposition at 17-18.

exercise of market power in the local exchange sector should have witnessed a decrease in ILEC market share across multiple product offerings. In reality, just the opposite has occurred. If an ILEC has yet upgrade its network in the face of competition from CLECs, there is no evidence to support that it would suddenly do so once the competitive threat has abated.²⁹ Currently, access to UNEs and resale is allowing CLECs to deploy fiber to urban and rural communities, and helping achieve the Commission's stated aim of closing the digital divide.³⁰ Granting the Petition and undermining the progress competitive carriers are making to close the digital divide would be contrary to the public interest.

USTelecom's Petition fails to satisfy any of the three prongs of the section 10 test. The Commission should deny USTelecom's request as to sections 251(c)(3) and (4) and associated requirements under sections 251 and 252.

III. USTELECOM HAS NOT MET ITS BURDEN FOR FORBEARANCE FROM SECTION 271(C)(2)(B).

Section 271(c)(2)(B), checklist item 3, requires that a Bell operating company ("BOC") provide "nondiscriminatory access to poles, ducts conduits, and rights of way owned by the BOC at just and reasonable rates in accordance with the requirements of section 224."³¹ USTelecom's Petition for forbearance from this obligation fails the third prong of the Commission's section 10(b) forbearance test because it fails to provide any evidence that a grant of relief would serve the public interest.

As the Commission is well aware, gaining reasonable and timely access to essential infrastructure is one of the most pressing impediments to deploying broadband facilities.³² The

²⁹ See Competitive Carriers Group Opposition at 52, EFF Opposition at 13.

³⁰ See EFF Opposition at 3-5, 7-12.

³¹ 47 U.S.C. § 271(c)(2)(B)(iii).

³² See e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers

record demonstrates that access to 271(c)(2)(B) remedies remain necessary, and forbearance from those sections of the Act would be contrary to the public interest.³³ Preserving the FCC’s authority under section 271(c)(2)(B) to ensure reasonable access to rights-of-way is critical to helping the Commission achieve its goal of accelerating broadband deployment, increasing broadband investment in the U.S., and closing the digital divide that afflicts rural communities. Access to poles, conduits, and rights of way are critical for deploying advanced wireless infrastructure. Forbearance from section 271(c)(2)(B) does not serve the public interest because it would unnecessarily limit the tools the Commission has available to achieve its important public interest objectives.

IV. USTELECOM HAS NOT MET ITS BURDEN FOR FORBEARANCE FROM SECTION 272(E)(1) OF THE ACT AND SECTION 64.1903 OF THE COMMISSION’S RULES.

USTelecom also fails to meet its burden for forbearance relief from section 272(e)(1) of the Act and section 64.1903 of the FCC’s rules. The Commission has consistently held that BOCs have strong incentives to take advantage of upstream inputs as a tool for raising competitor costs by, for example, slow-rolling critical functions used by wholesale customers, including provisioning, maintenance, and charging excessive amounts.³⁴ Section 272(e)(1), which requires that each BOC “fulfill any requests from an unaffiliated entity for telephone

to Infrastructure Investment, WC Docket No. 17-84, WT Docket No. 17-79, *Third Report and Order and Declaratory Ruling*, FCC 18-111 (rel. Aug. 3, 2018); Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, *Second Report and Order*, FCC 18-30 (rel. Mar. 30, 2018).

³³ See e.g., Michigan PSC Comments at 7-8, Pennsylvania PUC Comments at 8.

³⁴ See, e.g., *Ameritech Corp. and SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 190 (1999) (“Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs’ retail markets. This observation is the fundamental postulate underlying modern U.S. telecommunications law.”); see also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877 ¶ 65 (1996) (“[A] BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets.”).

exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates,”³⁵ and section 64.1903 of the Commission’s rules, which imposes structure separation requirements on incumbent LECs that provision long-distance services, prevent BOCs and independent incumbent LECs from acting upon those anti-competitive incentives.³⁶ Nothing in the USTelecom Petition shows that the protections afforded by section 272(e)(1) and section 64.1903 are not needed to guard against unjust or unreasonably discriminatory charges or practices.³⁷ As the Center for Democracy & Technology explains, “as long as competing providers depend on wholesale inputs from BOCs, the customers of those providers can be harmed by unjust and unreasonable, or discriminatory practices by the BOC against competitors.”³⁸ USTelecom’s Petition fails to adequately or persuasively explain why granting forbearance will not lead to higher prices for consumers or harm the public interest. Thus, the Commission must deny the Petition.

V. CONCLUSION.

The record is clear and nearly unanimous in its opposition to USTelecom’s Petition. For all of the above reasons, the Commission must reject USTelecom’s petition and continue enforcing these important laws and regulations for the benefit of competition and consumers alike.

³⁵ 47 U.S.C. § 272(e)(1).

³⁶ 47 C.F.R. § 64.1903.

³⁷ *See e.g.*, Competitive Carriers Group at 75-77.

³⁸ Comments of Center for Democracy & Technology, WC Docket No. 18-141, at 9 (filed Aug. 6, 2018).

Respectfully submitted,

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